

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JIMMY D. SMOTHERS

Claimant

VS.

TRANSERVICE LOGISTICS, INC.

Respondent

AND

**HARTFORD INSURANCE COMPANY
OF THE MIDWEST**

Insurance Carrier

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Docket No. 1,039,301

ORDER

Respondent and its insurance carrier appealed the January 13, 2009, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on May 5, 2009, in Topeka, Kansas.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. D'Ambra M. Howard of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a February 4, 2007, accident in which claimant fell at work and fractured his left patella (kneecap). While on crutches, claimant developed cubital tunnel syndrome in his left elbow. Later, after he stopped using crutches, claimant developed right hip pain.

In the January 13, 2009, Award, Judge Moore awarded claimant a 28 percent permanent partial general disability under K.S.A. 44-510e. The Judge held claimant sustained permanent injuries and impairment to the left leg, left arm, and right hip, all of which comprised a 28 percent whole person impairment. The Judge rejected the 10 percent left upper extremity rating provided by Dr. Robert Unsell as that rating was not based upon the required fourth edition of the *AMA Guides*.¹ Likewise, the Judge rejected the 20 percent left lower extremity rating provided by Dr. Gregory Zeiders as that rating was not based upon the fourth edition of the *Guides*. Instead, the Judge adopted the impairment ratings provided by claimant's medical expert witness, Dr. P. Brent Koprivica, who found claimant sustained a 20 percent impairment to the left lower extremity for the patella injury, a 30 percent impairment to the left upper extremity from the cubital tunnel syndrome, and a 10 percent impairment to the right lower extremity due to the right hip.

Respondent first argues the Judge erred by finding that claimant sustained a permanent impairment or permanent injury to the right hip. In short, respondent maintains that claimant should only receive permanent disability benefits under the schedule of K.S.A. 44-510d for the injuries claimant sustained to his left knee and left upper extremity. Next, respondent argues the Board should find that claimant sustained a 10 percent impairment to the left upper extremity as opined by Dr. Unsell and a left lower extremity impairment of 9 percent, which respondent derived from Dr. Zeiders' analysis.

Claimant requests the Board to affirm the Judge's finding that claimant has sustained a 28 percent permanent partial general disability under K.S.A. 44-510e. Claimant, however, maintains the Judge erred by applying a \$50,000 cap rather than a \$100,000 cap to his permanent partial disability benefits.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's impairment?
2. Should claimant's permanent partial disability benefits be limited to \$50,000?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

Claimant fell at work on February 4, 2007, and fractured his left patella. The parties agreed claimant's accident arose out of and in the course of his employment with respondent.

Dr. Gregory Zeiders began treating claimant and within days of the accident performed an open reduction on claimant's left knee. The doctor removed part of claimant's kneecap, wired together the remaining fragments, and tried to repair the retinaculum, which is one of the connective tissues that allows the kneecap to slide in place.

While on crutches and recuperating from the knee surgery, claimant developed left elbow pain and numbness in his left hand. Accordingly, claimant was referred to an orthopedic hand surgeon, Dr. Robert Unsell, who performed surgery on claimant's left elbow.

Before falling at work claimant had never experienced problems in his right hip. But after discarding the crutches he had been using due to his left knee injury and surgery, claimant began walking with a limp and experiencing right hip pain.

Claimant testified he discussed the limp that he had developed and right hip symptoms with Dr. Zeiders on their final visit in January 2008. He also testified his wife and "the workmen's comp lady", Janet or Janice, were present during that conversation.² Claimant testified, in part:

I asked Doctor Zider [*sic*] about my right hip and the way I limp and if there was anything that could be done about it. And he said, not really, you're just probably always going to have a limp and you're probably going to hurt. It comes from -- when my knees hurt really bad is what it comes from.³

Myra Smothers, claimant's wife, testified and confirmed that her husband spoke about his right hip with Dr. Zeiders in January 2008 when he last met with the doctor.

In addition to the intermittent pain he now experiences in his right hip, claimant maintains he also continues to experience pain on a daily basis and intermittent stiffness in his left knee, intermittent pain in both his left elbow and forearm, and intermittent numbness in his left little finger. A December 2007 MRI showed claimant had osteoarthritic changes in the medial compartment and the patellofemoral joint of his left knee.

² R.H. Trans. at 14.

³ *Id.* at 19.

Respondent acknowledges that claimant is entitled to receive workers compensation benefits for both the left knee and left elbow injuries. But respondent disputes that claimant sustained any permanent injury or permanent impairment to his right hip.

Claimant presented the testimony of his expert medical witness, Dr. P. Brent Koprivica, who evaluated claimant in May 2008. The doctor concluded that claimant had sustained a comminuted fracture of the patella in the February 2007 accident and, as a result, claimant had undergone a partial patellectomy, open reduction with internal fixation, and repair of the retinaculum. Using the fourth edition of the *AMA Guides*, Dr. Koprivica rated claimant as having a 30 percent left upper extremity impairment; a 10 percent right lower extremity impairment for his hip; and a 20 percent impairment to the left lower extremity for the left knee injuries. Combining those ratings, the doctor concluded claimant sustained a 28 percent whole person impairment. The doctor explained claimant's right hip pain, as follows:

Yeah. The thing that I would let you know is that he had significant weakness of extension on the left, so he objectively has problems related to that patellar fracture, which is what you expect, because the kneecap is part of the extensor mechanism.

So when you're weak with one side in terms of extension, you compensate by overusing the opposite side. He told [me that] when he would climb into his truck he would use his right leg. When he's climbing a ladder he uses his right leg and when he goes up stairs he uses his right leg. And he doesn't walk normally because of the problem on the left, so when he stands he tends to use his right leg more than his left. Those kind of things to try to relieve pain. That all makes sense to me that the right side would be symptomatic.⁴

Respondent presented the testimony of Dr. Unsell, the orthopedic hand surgeon who in early June 2007 began treating claimant's left elbow pain and the numbness in claimant's left hand. The doctor diagnosed both left cubital tunnel syndrome and left carpal tunnel syndrome, which were confirmed by EMG studies.

In early August 2007, Dr. Unsell released the left cubital tunnel. When he last saw claimant in mid-December 2007, the doctor released claimant without restrictions as claimant's symptoms had allegedly completely resolved. According to a December 12, 2007, progress report to the insurance carrier, Dr. Unsell rated claimant as having a 10 percent left upper extremity impairment as measured by the *fifth* edition of the *AMA Guides* for the cubital tunnel injury. The doctor was not asked at his deposition what claimant's rating would be under the *fourth* edition of the *Guides*.

⁴ Koprivica Depo. at 22, 23.

Dr. Zeiders, the orthopedic surgeon who treated claimant's fractured patella, also testified. The doctor began treating claimant in early February 2007 and soon after operated on claimant's left knee. Dr. Zeiders treated claimant through late January 2008 and he likewise rated claimant using the *fifth* edition of the *AMA Guides*. Dr. Zeiders determined claimant had a 20 percent impairment to the left lower extremity due to the "partial patellectomy and damage to the osteochondral surfaces and repair of his retinacular and capsular structures."⁵ The doctor was not asked at his deposition what impairment rating claimant would have under the *fourth* edition of the *Guides*.

Dr. Zeiders' office notes do not mention problems with claimant's right hip. Moreover, the doctor does not recall talking with claimant about his right hip at their last meeting in January 2008. The doctor, however, noted in December 2007 that claimant might always limp due to the left knee injury.⁶ The doctor acknowledged that it was consistent for claimant to experience increased pain in his left knee from activity and that it would not be unusual for claimant to have an abnormal gait.

The Board agrees with, and affirms, the Judge's finding that claimant has sustained a 28 percent whole person functional impairment as a result of his February 4, 2007, accident. The Board is persuaded that Dr. Koprivica is the only doctor to actually evaluate claimant's hip after he became active. The more active claimant becomes, the more his left knee hurts; and the more claimant's left knee hurts, the more he limps and experiences right hip pain. Moreover, Dr. Koprivica is the only physician to rate claimant using the fourth edition of the *AMA Guides*, which is required by the Workers Compensation Act.⁷

CONCLUSIONS OF LAW

As indicated above, the Board affirms the Judge's finding that claimant sustained a 28 percent whole person impairment due to his February 2007 accident and the resulting injuries. Because claimant has returned to work for respondent and earns approximately the same wages as he was earning on the date of accident, claimant acknowledges that his permanent partial general disability under K.S.A. 44-510e should be based upon his whole person functional impairment rating. Consequently, claimant has sustained a 28 percent permanent partial general disability under K.S.A. 44-510e.

⁵ Zeiders Depo. at 11.

⁶ *Id.* at 20.

⁷ See K.S.A. 44-510e.

The Judge limited claimant's award of permanent partial general disability benefits to \$50,000. Claimant cites *Roberts*⁸ for the proposition that the \$50,000 cap in K.S.A. 44-510f(a)(4) does not apply because claimant received temporary total disability benefits for his injuries. The Board notes, however, that *Roberts* does not control because a petition for review was filed on April 20, 2009.

The Workers Compensation Act in K.S.A. 44-510f(a) provides the following maximum amounts for disability compensation:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof;

(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof;

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.

The majority of the Board finds the statute is clear and unambiguous; namely, when permanent partial disability benefits are awarded based upon the worker's functional impairment rating, the statute limits those permanent partial disability benefits to the maximum sum of \$50,000. Consequently, the majority affirms the Judge's computation of claimant's award.

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the January 13, 2009, Award entered by Judge Moore.

⁸ *Roberts v. Midwest Mineral, Inc.*, ___ Kan. App. 2d ___, 204 P.3d 1177, *pet. for rev. filed* (2009).

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned continues to adopt the view that K.S.A. 44-510f(a)(4) does not apply to scheduled injuries. However, the statute is applicable to non-scheduled injuries.

In *Roberts* the question is posed: "If the \$50,000 compensation cap in K.S.A. 44-510f(a)(4) applies to both scheduled and nonscheduled injuries, then what type of claims are subject to the \$100,000 compensation cap in K.S.A. 44-510f(a)(3)?"⁹ The answer is that the \$100,000 cap applies to work disability awards.

In the undersigned's opinion, the \$50,000 cap was intended to apply to non-scheduled injuries where "functional impairment only is awarded."¹⁰ And the \$100,000 cap is applicable to non-scheduled injuries where a work disability (a permanent partial general disability greater than the functional impairment rating) is awarded.

BOARD MEMBER

⁹ *Roberts*, 204 P.3d at 1181.

¹⁰ K.S.A. 44-510f(a)(4).

DISSENT

The undersigned respectfully disagrees with the majority's holding that claimant's permanent partial disability benefits are limited to a maximum of \$50,000. Although a petition for review has been filed and, therefore, *Roberts* is not a final decision, its reasoning is persuasive. Because claimant's award included temporary total disability benefits along with permanent partial disability benefits, the \$50,000 cap of K.S.A. 44-510f(a)(4) does not apply. The statute is clear and unambiguous the \$50,000 cap applies only in those situations where *functional impairment only is awarded*. Because claimant was awarded both temporary total disability benefits and permanent partial disability benefits the appropriate cap is \$100,000 as provided in K.S.A. 44-510f(a)(3), which provides:

subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, **including** any prior **temporary total**, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof (Emphasis added.)

In conclusion, the majority has erred by limiting claimant's permanent partial disability benefits to \$50,000.

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge